

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF WINCHESTER)	
MUNICIPAL UTILITIES FOR APPROVAL OF)	CASE NO.
THE COLLECTION OF SYSTEM)	96-616
DEVELOPMENT CHARGES)	

O R D E R

Boonesboro Water Association, Inc. ("Boonesboro") and East Clark County Water District ("East Clark District") (collectively "the Intervenor") have moved to quash Winchester Municipal Utilities' ("WMU") requests for information. Having considered the motion, WMU's response thereto, and the Intervenor's reply, the Commission denies the motion.

On June 9, 1997, WMU served 142 requests for information upon the Intervenor. Approximately 64 of these requests were directed to Boonesboro. The remaining 78 requests were directed to East Clark District. WMU's action was consistent with the Commission's Order of March 24, 1997, which established a procedural schedule for this proceeding.

The Intervenor has made a general objection to the requests and moved to quash them. As grounds for their motion, the Intervenor contends that: (1) As they did not file any written testimony in this proceeding, they should not be subject to any requests for information; (2) Mere participation in Commission proceedings does not subject an intervenor to discovery; (3) WMU's action is an abuse of the Commission's

procedures and is an attempt to intimidate the Intervenor; and (4) Requiring the Intervenor to answer requests for information except on issues related to the direct testimony of their witnesses will have a "chilling effect" on intervention in future Commission proceedings.

In addressing the Intervenor's contentions, the Commission must first consider an intervenor's position in a Commission proceeding. As an intervenor, a party has the right to present evidence, to conduct discovery, to examine opposing witnesses and to present argument (oral and written). Even in those instances where an intervenor presents no witnesses, its arguments and the evidence which it adduces through cross-examination of opposing witnesses must be addressed by opposing parties and considered by the Commission.

In light of this position, intervenors should be subject to discovery. The purpose of discovery is to make an administrative hearing "less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent possible," United States v. Procter & Gamble, 356 U.S. 677, 683 (1958), as well as to narrow and clarify the issues in dispute. Hickman v. Taylor, 329 U.S. 495, 501 (1947). Regardless of whether an intervenor presents witnesses, only if its positions are known to the other parties before the administrative hearing, can such a hearing be meaningful and effective.

The Commission does not accept the proposition that a party is exempt from discovery in a Commission proceeding merely because of its decision not to present testimony. No such exemption is found within the Kentucky Rules of Civil Procedure or

the Federal Rules of Civil Procedure. Participation in Commission proceedings, moreover is a two-way street. A party may not engage in discovery of another party,¹ then seek to protect itself from similar discovery merely by declining to present testimony. To hold otherwise would allow parties to game the administrative process.

Allowing discovery, furthermore, does not alter the burden of proof in these proceedings. While discovery is routinely permitted upon defendants in civil proceedings, the burden of proof remains with the plaintiff. CR 43.01. Similarly, the applicant for a rate adjustment continues to bear the burden of proof to show that its proposed rate is just and reasonable. KRS 278.190(3).

The Commission further finds that contrary to the Intervenor's contention, WMU's requests for information are not improper practices. In its Order of March 24, 1997, the Commission expressly provided for WMU's requests. It placed no restrictions or conditions on such requests. The Commission's review of these requests indicates that most, if not all, address relevant issues.²

The Commission shares the Intervenor's concerns that requests for information may be used to intimidate or threaten potential intervenors. Such requests must be carefully monitored. Only those requests that are relevant and reasonable will be permitted. The Commission, either upon its own motion or upon the motion of an opposing party, will quash those which it finds are unduly cumbersome, irrelevant, or

¹ The Commission notes that the Intervenor's jointly served 87 requests for information on WMU.

² While the Intervenor's have made a general objection to WMU's request, they have not submitted specific objections to any request.

oppressive. The potential for abuse, however, is not an acceptable reason for denying a party's right to discovery.

For these reasons, the Commission HEREBY ORDERS that:

1. The Intervenor's Motion to Quash is denied.
2. Intervenor shall respond to WMU's request for production of documents no later than July 7, 1997.

Done at Frankfort, Kentucky, this 1st day of July, 1997.

PUBLIC SERVICE COMMISSION


For the Commission

ATTEST:


Executive Director